LIABILITY OF CONTRACTORS AND INDEMNIFICATION THEREOF BY NASA FOR CLAIMS FOR DAMAGES ARISING OUT OF THE PERFORMANCE OF NASA CONTRACTS

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Potential claims for personal injuries and property damages to members of the public arising out of the extremely hazardous activities of NASA, if uncompensated, could become a tragic social problem. This would be especially true in the event of a mjaor catastrophe or disaster in which great monetary damages are sustained. There are three major alternative methods by which the burden of damages caused by such a devastating accident might be distributed.

The first and least satisfactory method is to let the damages fall where they may. That is, to let the injured members of the public bear their own loss. This method is repugnant to the basic ideas of fundamental fairness, as it would result in the most innocent of all parties involved suffering the greatest loss.

The second method would be for the Government, as the prime benefactor of the hazardous activity, to bear the responsibility for damages arising out of its programs. The effect of a direct suit against the Government, however, is strongly curtailed by provisions of the Federal Tort Claims Act (28 U.S.C. 1346(b)), which makes proof of negligent or wrongful acts by employees of the Government a prerequisite to recovery. Such proof may be very hard to come by where the activity involved is primarily that of contractor personnel as is the case on most NASA projects. Even where there is proof of fault on the part of the Government employee, the "discretionary function" exception to the Act /Sec. 2680(a)/ might be successfully invoked to block an action. The Supreme Court in Dalehite v. United States, 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953) (The"Texas City Disaster" case) has interpreted the exceptions in the following language:

> " . . . that the 'discretionary functions or duty' . . . cannot form the basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifi-

> cations or schedules of operations. Where there is room for policy judgment and decision there is discretion."

Although Dalehite has been seriously narrowed in subsequent cases /see, for example, Indian Towing Co. v. United States, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955)/ the Court has as recently as 1963 held that the purpose of the exception is "to protect the Government from liability that would seriously handicap efficient Government operations." United States v. Munir, 374 U.S. 150, 163, 10 L.Ed. 2d 805, 83 S.Ct. 1850 (1963). It seems rather clear that most of NASA's activity in the Space program would be a discretionary function.

By provisions contained in Section 203(b)(13) of the National Aeronautics and Space Act of 1958, NASA may settle, administratively, claims against the United States for bodily injury or death which do not exceed $5,000 and may report such meritorious claims as exceed this amount to the Congress for its consideration. This authority, however, is purely discretionary on the part of NASA and an injured member of the public could not force NASA to grant this relief. It should also be noted that the amount of relief available under this authority is comparatively minute.

Congress, of course, could consider each claim for damages on an ad hoc basis "after the fact" and by emergency legislation grant such relief as it (the Congress) feels the claim merits. This method has the theoretical advantage of clearly complying with the intent of Congress as to the obligation and expenditure of funds, but it also has the practical disadvantages of being time consuming and indefinite. Injured parties might wait many months and even many years for Congress to act upon their claims and there is no guarantee that the relief granted by Congress would bear any relationship to the damages suffered.

Considering the drawbacks to an action against the Government, it would perhaps be in the best interest of an injured member of the public to pursue his claim against the contractor involved. Assuming that negligence of the contractor could be proven or that liability could otherwise be established, the injured third party could obtain a judgment under the principles of existing tort law.

It is consistent with good business practice that one who undertakes to perform a contract should be willing to accept the risk incidental thereto and include the cost of this risk as an element in computing his bid or proposal for the contract.

It is possible, however, that damage claims arising from a serious catastrophe could exceed the assets of even the largest Space contractors and that an injured party would have little more than a valid claim against a judgment proof tort-feasor. To guard against this situation and in the interest of economy it may sometimes be desirable for the Government to bear a portion of the risk involved in performing a NASA contract. This risk bearing could take the form of either an agreement or obligation on the part of the Government to indemnify the contractor for certain losses or an agreement to pay or reimburse the contractor for the cost of premiums on liability insurance with commercial insurers.

Under existing law some Government agencies have statutory authority to indemnify their contractors for certain losses. The Department of Defense, for example, has authority to indemnify its Research and Development contractors for claims arising out of direct performance of their contracts which result from risk defined in the contract as unusually hazardous. This authority is found in Section 2354 of Title 10 of the United States Code, a portion of which reads

as follows:

> "(a) With the approval of the Secretary of the Military Department concerned, any contract of a military department for research or development, or both may provide that the United States will indemnify the contractor against (claims by third persons for injury or damages or damages to the property of the contractor resulting 'from a risk that the contract defines as unusually hazardous'), but only to the extent that they arise out of the direct performance of the contract and to the extent not compensated by insurance or otherwise: . . ."

It should be noted that this authority is expressly limited to Research and Development contracts. At the present time the authority of 10 U.S.C. 2354 does not extent to NASA though it might be desirable to seek legislation granting such athority.

With respect to contracts let by the Atomic Energy Commission Section 170 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2210) reads as follows:

> "(a) Each license issued under (the Act) may, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Commission shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it shall be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section . . .
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> "(b) The Amount of financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lessor amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (1) the cost and terms of the private insurance, (2) the type size and location of the licensed activity and other factors pertaining to the hazard, and (3) the nature and purpose of the licensed activity.

> "(c) The Commission shall, with respect to licenses issued between August 30, 1954 and August 1, 1977, for which it requires financial protection, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 . . .
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> "(d) In addition to any other authority the Commission may have, the Commission is authorized until May 1, 1977, to enter into agreements of indemnification with its contractors for the construction or operations of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the Commission may require its contractor to provide and maintain financial protection of such a type, and in such amounts as the Commission shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection of $500,000,000 . . . The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Commission . . ."

The provisions quoted are known popularly as the Price-Anderson Amendments to the Atomic Energy Act. Note that unlike the Department of Defense, the Atomic Energy Commission is given authority to indemnify not only its research and development contractors but also its production and facilities utilization contractors.

Public Law 85-804, 72 Stat. 972, provides that:

> "The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, . . . to enter into contracts or into amendments or modifications of contracts

> heretofore or hereafter made or to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment or modification of contracts whenever he deems that such action would facilitate the national defense. . . "
>
> "Sec. 5. This Act shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress by concurrent resolution may designate."

The legislative history of this Act clearly supports it use as a basis for making indemnification payments to contractors. Senate Report number 2348, August 12, 1948, in discussing the then pending act and the prior, temporary legislation upon which it was based stated:

> ". . . the departments authorized to use this authority have heretofore utilized it as the basis for making of indemnity payments under certain contracts. The need for indemnity clauses in most cases arises from the advent of nuclear power and the use of highly volatile fuels in the missile program . . . . It is, therefore, the position of the military departments that to the extent that commercial insurance is unavailable, the risk of loss in such a case should be born by the United States . . ."

It should be noted that use of the authority contained in P.L. 85-804 is limited to those agencies which are (1) authorized by the President and (2) exercise functions in connection with the National Defense. Executive Order number 10789, 3 CFR 426 authorizes several agencies including the NASA to exercise the authority contained in P.L. 85-804, but conditions its use "within the limits of the amounts appropriated and the contract authorization provided therefore." Due to the questionable legal effect of an agreement conditioned upon the availability of appropriations, current NASA policy is against the use of P.L. 85-804 as a basis of authority to make indemnification agreements.

General NASA policy on indemnification of contractors is set out in

NASA Procurement Regulation 10.350 (CCH Topical Law Reports ¶68,836) as follows:

> "(a) The indemnification authority available to the Department of Defense under 10 U.S.C. 2354 which applies to contracts for research or development, is not applicable to contracts of NASA. Furthermore, it is NASA's firm policy not to use the authority contained in Public Law 85-804 (50 U.S.C. 1431- 1435). It is also NASA's policy not to include in its contracts a special clause agreeing to indemnify contractors and subcontractors at some time in the future, if and when NASA should be authorized by subsequently enacted legislation to grant such indemnification, or if and when NASA might promulgate for general use an indemnification clause within the limits of existing legal authority. However, if indemnification authority is subsequently provided to NASA by legislation, NASA will do whatever is permitted by the statute and other available authority to apply its provisions so that all elements of industry similarly situated are treated in the same fashion and that a proper assumption of risk is undertaken by the Government, whether such risk arise under contracts in effect or are contemplated in any new contract."

Subsection (b) of that regulation provides for exceptions relating to the use of the indemnification authority of the Price Anderson Act (42 U.S.C. 2010(c)) in NASA contracts under license or agreement with the Atomic Energy Commission. NASA Procurement Regulations 7.203-22 (CCH Topical Law Reports ¶68,583.10) and 7.402-26 (CCH Topical Law Reports ¶68,609.30) require that the following clause to be included in all cost reimbur-sement type contracts:

> "Insurance - Liability to Third Persons.
>
> "(c) The contractor shall be reimbursed: (I) for the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause and (II) for liabilities to third persons for loss of or damage to property . . ., or for the death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the contractor . . ., provided such liabilities are represented by final judgments or by settlements approved in writing by the Government . . ."

It would appear that while it is the general policy of NASA not to indemnify its contractors it will reimburse its cost-plus type contractors in the form of payments for allowable cost for liabilities incurred by the contractor in excess of his insurance coverage. There is, however, no similar protection for fixed price or lump-sum contractors (except those dealing with nuclear materials or research who may be indemnified under the Price-Anderson Act). For this reason it might be advisable for the Congress to enact legislation granting NASA authority to indemnify its space program contractors similar to the authority granted the Atomic Energy Commission for its nuclear programs by 42 U.S.C. 2210.

An alternative would be to seek modification of Executive Order 10789 to permit a more unambiguous use of P.L. 85-804 authority. Even with modification of the executive order, however, indemnification under P.L. 85-804 would be available only for those NASA programs which facilitate the national defense and only during periods of declared national emergency.

It should also be noted that Article 1, Section 9, clause 7, of the U.S. Constitution provides that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." This contitutuional limitation is absolute, and it forbids the payment of any debt, even a judgment against the United States, unless Congress should appropriate the funds. This means that even with new legislation, NASA could not indenify its contractors for amounts in excess of NASA's appropriations, and claims for damages in excess of these appropriations (a conceivable, though remote, possibility) would be forced to depend upon specific action by the Congress.